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EXAMINER

PORTER, RACHEL L

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3626

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GROUP 3600

**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Application Number: 09/628,400
Filing Date: August 01, 2000
Appellant(s): SELBY, DAVID A.

Mark D. Simpson, Reg. No. 32,942
For Appellant

EXAMINER'S ANSWER

This is in response to the appeal brief filed 2/4/05.

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(1) *Real Party in Interest*

A statement identifying the real party in interest is contained in the brief.

(2) *Related Appeals and Interferences*

A statement identifying the related appeals and interferences which will directly affect or be directly affected by or have a bearing on the decision in the pending appeal is contained in the brief.

(3) *Status of Claims*

The statement of the status of the claims contained in the brief is correct.

(4) *Status of Amendments After Final*

No amendment after final has been filed.

(5) *Summary of Invention*

The summary of invention contained in the brief is correct.

(6) *Issues*

The appellant's statement of the issues in the brief is correct.

(7) *Grouping of Claims*

Appellant's brief includes a statement that claims 1-2 and 14-15 (Group A) and claims 3-13 and 16-26 (Group B) do not stand or fall together and provides reasons as set forth in 37 CFR 1.192(c)(7) and (c)(8).

(8) *Claims Appealed*

The copy of the appealed claims contained in the Appendix to the brief is correct.

(9) *Prior Art of Record*

6,298,348	ELDERING	10-2001
5,191,523	WHITESAGE	3-1993

(10) Grounds of Rejection

The following ground(s) of rejection are applicable to the appealed claims:

Claim Rejections - 35 USC § 112

1. The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

2. Claims 1-26 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

Claim 1 currently recites that the “past reservation information including information unrelated to said particular perishable commodity.” It is unclear to the Examiner what type of information the Applicant intends to claim with the presently recited “information unrelated to said particular perishable commodity.” It is respectfully submitted that such a limitation is tantamount to a negative limitation, which attempts to define the information in terms of what it is not, rather than what it is. As such, the scope of the claim cannot be ascertained. Claims 2-13 inherit the deficiencies of claim 1 through dependency and are also rejected.

Claim 14 recites similar wording to claim 14. As such, the analysis of claim 1 may be applied to claim 14. Claims 15-26 inherit the deficiencies of claim 14 through dependency and are also rejected.

In light of the 112 2nd problems, the examiner is interpreting the claims and applying prior art as best possible using these interpretations. These interpretations of claim language are for examination purposes only. The Examiner will interpret the “perishable commodity” to be a seat on a flight and the “unrelated information” to be other seats on the flight.

Claim Rejections - 35 USC § 102

3. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

4. Claims 1-2 and 14-15 are rejected under 35 U.S.C. 102(b) as being anticipated by Jung (4,775,936).

(A) As per claim 1 Jung teaches a forecasting system for a particular perishable commodity comprising the steps of:

a) gathering past system-wide reservation information for perishable commodities that have already perished (Jung; col. 2, lines 15-17), said system wide information including information unrelated to said particular perishable commodity

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b) gathering current reservation information for a particular perishable commodity that has not yet perished (Jung; col. 2, lines 15-17);

c) comparing the gathered past system-wide reservation information unrelated to said particular perishable commodity and the current reservation information (Jung; col. 2, lines 15-50, and col. 4, lines 15-25);

d) calculating, based on the comparison, the demand-based booking level based on average “no-shows” (i.e., likelihood that the current reservation will materialize) (Jung; col. 2, lines 15-50, and col. 4, lines 15-25);

e) outputting the demand-based booking level (DBBL) based on average “no-shows” (i.e., materialization forecast) results (Jung; col. 2, lines 15-50, col. 4, lines 15-25, and Figure 4).

(B) As per claim 2, Jung teaches the past system-wide reservation data includes historical commodity details unrelated to said particular perishable commodity (Jung; col. 3, lines 29-31).

(C) Apparatus claims 14-15 differ from claims 1-2, respectively, in that claims 1-2 contain a method recited as a series of function steps whereas claims 14-15 contain features recited in a “means plus function” format. As the method of step claims 1-2 has been shown to be disclosed or obvious by the combined teachings of Jung, it is readily apparent that the “means” to accomplish those method steps is obvious in view

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of the prior art. As such, the limitations recited in claims 14-15 are rejected for the same reasons given for method claims 1-2, respectively, and incorporated herein.

Claim Rejections - 35 USC § 103

5. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

6. Claims 3-11, and 16-24 are rejected under 35 U.S.C. 103(a) as being unpatentable over Jung as applied to claims 1-2 and 14-15 above, and further in view of Eldering (6,298,348 B1).

(A) As per claim 3, Jung teaches past system-wide reservation information that is unrelated to the potential purchase of said particular perishable commodity (Jung; col. 3, lines 30-45-see 112,2nd par. Rejection). However, Jung does not expressly teach that the past system-wide reservation information includes Point-of-Sale (POS) information. Eldering teaches the inclusion of POS information (Eldering; col. 5, line 65 to col. 6, line 8, and col. 9, lines 42-67). At the time of the Applicant's invention, it would have been obvious to one of ordinary skill in the art to add the POS information of Eldering to the materialization method of Jung with the motivation of performing consumer profiling (Eldering; col. 5, lines 65-66).

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(B) As per claim 4, Jung teaches the past system-wide reservation information includes materialization information unrelated to the potential purchase of said particular perishable commodity (Jung; col. 2, lines 30-35 see 112,2nd par. Rejection).

(C) As per claims 5-6, Jung teaches past system-wide reservation information (Jung; col. 3, lines 30-45). However, Jung does not expressly disclose the past reservation information including demographic information about the person who made the past reservations and specifically age, sex, and annual income. Eldering teaches the historical information including demographic information about the purchaser, such as age, sex and annual income (Eldering; Figure 2A and col. 7, lines 2-52). It would have been obvious to one of ordinary skill in the art at the time of the invention to add the demographic information of Eldering to the materialization forecasting method of Jung with the motivation of forming "a description of the consumer including demographic characteristics and product preferences" (Eldering; col. 3, lines 34-36).

(D) As per claim 7 and 11, Jung teaches the gathering of historical traffic flow information including aircraft capacity (i.e., commodity details) for each flight that is then compared to current traffic flow information (Jung; col. 3, lines 25-45 and col. 4, lines 14-20).

(B) As per claims 8-9, Jung teaches current and historical reservation information (Jung; col. 4, lines 15-20). However, Jung does not expressly include Point-of-Sale

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(POS) information. Eldering teaches the current reservation information including POS records (Eldering; col. 9, lines 42-50) and demographic information about the person making the purchase (Eldering; col. 12, lines 33-40). It would have been obvious to one of ordinary skill in the art at the time of the invention to add the POS and demographic information in the reservation information method of Jung with the motivation of "understanding the demographics and product preferences of the consumer in order to be able to determine if an advertisement is appropriate" (Eldering; col. 2, lines 22-24).

(C) Claim 10 recites the same limitations as claim 6, and is therefore, rejected for the same reasons provided for that claim, and incorporated herein.

(D) Apparatus claims 16-24 differ from claims 3-11, respectively, in that claims 3-11 contain a method recited as a series of function steps whereas claims 16-24 contain features recited in a "means plus function" format. As the method of step claims 3-11 has been shown to be disclosed or obvious by the combined teachings of Jung and Eldering, it is readily apparent that the "means" to accomplish those method steps is obvious in view of the prior art. As such, the limitations recited in claims 16-24 are rejected for the same reasons given for method claims 3-11, respectively, and incorporated herein.

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7. Claims 12-13 and 25-26 are rejected under 35 U.S.C. 103(a) as being unpatentable over Jung and Eldering as applied to claims 11 and 24 above, and further in view of Whitesage (5,191,523).

(A) As per claim 12, the combined teaches of Jung and Eldering teach the current reservation information includes Point-of-Sale (POS) information (Eldering; col. 5, line 65 to col. 6, line 8, and col. 9, lines 42-50). However, the combined teachings of Jung and Eldering do not expressly disclose the POS information including a booking carrier, booking recency or fare code information. Whitesage, teaches the POS information including booking carrier, booking recency and fare code information (Whitesage; Figures 3, 6AF). It would be obvious to one of ordinary skill in the art at the time of the invention to expand the POS information of the combined method of Jung and Eldering to include the specific POS details of Whitesage with the motivation of "recording the amount payable to the airline issuing the ticket and the receivable due from the client" (Whitesage; col. 1, lines 60-62).

(B) As per claim 13, Jung teaches the gathering of historical traffic flow information including aircraft capacity (i.e., commodity details) for each flight that is then compared to current traffic flow information because of similar traffic characteristics (Jung; col. 3, lines 25-45 and col. 4, lines 14-20).

(C) Apparatus claims 25-26 differ from claims 12-13, respectively, in that claims 12-13 contain a method recited as a series of function steps whereas claims 25-26 contain

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features recited in a “means plus function” format. As the method of step claims 12-13 has been shown to be disclosed or obvious by the combined teachings of Jung, Eldering and Whitesage, it is readily apparent that the “means” to accomplish those method steps is obvious in view of the prior art. As such, the limitations recited in claims 25-26 are rejected for the same reasons given for method claims 12-13, and incorporated herein.

(11) Response to Argument

The Appellant's arguments will be addressed in the order in which they appear in the Appeal Brief.

(A) The Appellant argues that the rejections of claims 1-26 under 35 U.S.C. 112, 2nd paragraph are improper. In particular, the Appellant traverses the rejections by stating that negative limitations in claims are not *per se* improper, and do not automatically render claims indefinite.

In response, it is not the Examiner's position that all negative limitations in claim language are improper and indefinite. However, in the present case, claims 1 and 14 currently recite “past reservation information including information unrelated to said particular perishable commodity.” The scope of the claims could not be ascertained because current wording attempts to define the information in terms of what it is not, rather than what it is. In other words, the current language attempts to claim all information not related (i.e. unrelated) to the perishable commodity.

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As such, the current claim language is vague and indefinite because, it unclear to the Examiner what type of information the Applicant intends to claim with the presently recited "information unrelated to said particular perishable commodity." For example, if the commodity is an airline seat, information on 2 separate seats on the same flight may be reasonably interpreted as unrelated data (i.e. dealing with separate commodities) or related data (dealing with the same flight). Similarly, information on 2 separate flights may be deemed "related" because they are both related to flight information, or unrelated, because they are distinguished by some other attribute (i.e. different destinations, origins, etc.)

The example provided by the Appellant on pages 8-9 of the Appellant's Brief underscores the lack of clarity in the current claim language. While the Appellant argues that the phrase the limitation "including information unrelated to said particular perishable commodity" makes "a clear distinction between flight reservation pertaining to" the two flights (Flight 50 leaving daily between Paris and London and Flight 26 leaving Sundays between Paris and London), it is the Examiner's position that the information describing the flights may be interpreted as unrelated (i.e. different flight numbers) or related (e.g. same destination, origin, and both flights fly to the same cities on Sunday)

In light of the 112, 2nd paragraph issues raised by Appellant's claim language, the Examiner has given the claim language the broadest reasonable interpretation, and applied prior art accordingly.

(B) Appellant attempts to differentiate the reservation information recited in the pending claims from that included in the Jung reference. More specifically, Applicant argues that reservation information as "defined" in the specification is related to all reservation information, not just the "traffic information" of the Jung reference.

In response, the Appellant's arguments suggest that the Appellant provides particular definition with the recitation of the term "reservation information" in the current claim language. However, the Examiner was unable to find and the Appellant has not provided any portion of the current claim language or of the originally filed disclosure in which the term "reservation information" is explicitly defined to be any particular type of information. At most, the Appellant has relied upon broad, non-committal or exemplary language in the specification. (e.g. reservation information includes commodity details... and/OR POS information relating to reservations for perishable commodities).

(Appellant's specification, page 11, lines 12-19, description of past and current reservation information.) In the absence of such a definition, the Examiner must give the claim language the broadest reasonable interpretation, and the Examiner understands the term "reservation information" to include various types of information.

Moreover, assuming that the Appellant's narrow interpretation of the reservation information in the Jung reference is correct, and that the reservation information as "defined" in the Appellant's specification is related to ALL reservation information and not simply the "traffic information" of Jung, it is respectfully submitted that if the term "reservation information" in the claim language is broader in light of the Appellant's

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specification, then Jung's specific type of reservation information falls fully within the scope of the Appellant's use of the term. As such, the "narrow" reservation information found in the Jung reference meets the limitation(s) of the Appellant's claim.

(C) The Appellant argues that the Jung reference does not discuss "system-wide past reservation" information, and therefore does not anticipate the claimed invention.

In response, the Examiner has interpreted the phrase "system-wide" broadly to include any information that is included in the system. Again, the Appellant has not pointed to, and the Examiner was unable to find support for a narrow interpretation of the phrase in the claims or in the originally filed disclosure. Consequently, the Examiner must give the claim the broadest reasonable interpretation and apply art accordingly. The addition of the limitation "system-wide" is not deemed to alter the Examiner's interpretation of the applied prior art, and the previous prior art rejections have been maintained.

As stated by Appellant, Jung gathers data on a particular flight and that flight's history and analyzes this data to project appropriate overbooking levels. (page 11, lines 3-15 of Appellant's brief; See also Jung: abstract, col. 1, lines 66-col. 2, line 28) As such, it is respectfully submitted that the Jung reference addresses the claimed limitations of gathering system-wide data and analyzing the data to project whether the reservations will materialize.

(D) In arguing that Jung does not anticipate claims 1-2 and 14-15, the Appellant states that the present invention focuses on “the characteristics of purchasers and other reservation attributes...” whereas the prior art focuses only on historical data for a particular commodity. (See page 12 of Appellant’s Brief)

In response to applicant's argument that the references fail to show certain features of applicant’s invention, it is noted that the features upon which applicant relies (i.e., focusing on and analyzing information regarding the characteristics of the purchasers) are not recited in the rejected claim(s). Although the claims are interpreted in light of the specification, limitations from the specification are not read into the claims. See *In re Van Geuns*, 988 F.2d 1181, 26 USPQ2d 1057 (Fed. Cir. 1993).

The current language of the independent claims does not recite that any limitations regarding purchaser characteristics. Contrary to the Appellant’s statements regarding the novelty of the invention, the language of claims 1-2 and 14-15 focuses upon data regarding the commodity itself, not the purchaser of the commodity.

(E) The Appellant argues that Eldering and Whitesage do not teach or suggest the use of past system-wide reservation information.

In response to applicant's arguments against the references individually, one cannot show nonobviousness by attacking references individually where the rejections are based on combinations of references. See *In re Keller*, 642 F.2d 413, 208 USPQ 871 (CCPA 1981); *In re Merck & Co.*, 800 F.2d 1091, 231 USPQ 375 (Fed. Cir. 1986).

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Eldering, the secondary reference, has been relied upon to disclose the use of a point-of-sale terminal and the collection of demographic information regarding the purchaser. Furthermore Whitesage has been relied upon to disclose specific POS information. The Examiner has not relied upon the Eldering and Whitesage references for the gathering and analysis of past system-wide reservation information.

Furthermore, the examiner recognizes that obviousness can only be established by combining or modifying the teachings of the prior art to produce the claimed invention where there is some teaching, suggestion, or motivation to do so found either in the references themselves or in the knowledge generally available to one of ordinary skill in the art. See *In re Fine*, 837 F.2d 1071, 5 USPQ2d 1596 (Fed. Cir. 1988) and *In re Jones*, 958 F.2d 347, 21 USPQ2d 1941 (Fed. Cir. 1992). In this case, the Examiner has provided motivation for the combination from one or more of cited references to support the holding of obviousness.

For the above reasons, it is believed that the rejections should be sustained.

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Respectfully submitted,

RP


RP

April 18, 2005

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